app3-98

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

Appeal No. 3 OF 1998
IN
Chamber Summons No. 508 of 1994
in
Suit No. 3106 of 1985

Vandana Vensi Balwani,
of Bombay, Indian Inhabitant,
residing at Avbala 227, Sent
Andrews Road, Pali Hill, Bandra,
Bombay 400 050. .. ... Appellant

vs.

1. Kamala Jagdish Bhatia,
   of Bombay, Indian Inhabitant,

2. Alia Jagdish Bhatia,
   of Bombay, Indian Inhabitant,

3. Nirmal Mahesh Bhatia
   of Bombay, Indian Inhabitant,
   (Nos. 1 to 3 all residing at
   Plot NO. 457, II nd floor,
   15th Road, Khar, Bombay 400 050.

4. Bank of India,
   a Board corporate constituted
   under the Banking Companies
   (acquisition and transfer of
   undertakings Act) V of 1970
   having their Head Office at
   Expresee Tower, Nariman Point,
   Bombay 400 021, their Bombay
   Metropolitan Zonal Office at
   Phyroze Jeejeebhoy Tower,

Dalal Street, Bombay 400 023
and their branch at Sky Scrapper (A),
Bhulabhai Desai Road, Bombay 26.

5. The Court Receiver High Court,
Bombay having his Office
at Bank of India Building,
II nd Floor, Bombay 400 023.

6. Smt. Meena L. Asrani,
Ramchand Asrani of Bombay,
Indian Inhabitant, residing at
Plot NO. 457, Trimurti II nd floor,
15th Road, Khar, Bombay 400 050.

7. Naresh Lakhmichand Asrani of Bombay,
Indian Inhabitant, residing at Bhatia
Bhavan, 15th Road, Khar,
Bombay 400 052.

8. Harumal H. Ramnani, of Bombay,
Indian Inhabitant,
9. Maya Lokesh Ramnani, of Bombay,
Indian Inhabitant,

10.Harakchand L.Gala, of Bombay,
Indian Inhabitant,

11.a) Harakchand G.Gala, of Bombay,
Indian Inhabitant, residing at
457, Trimurti, 15th Road,
Khar, Bombay 400 050.

11.b) Jal Harakchand Gala, of Bombay,
Indian Inhabitant, residing at
457, Trimurti, 15th Road,
Khar, Bombay 400 050. ..... Respondents

Mr. G.G. Surana for appellant.
Ms. Kavita Shah i/b. A.G.Shah for respondents

CORAM: R.M.S. KHANDEPARKAR
AND
D. G. KARNIK JJ.

DATE: March, 26, 2007

ORAL JUDGMENT (Per R.M.S. KHANDEPARKAR J.)

1. Heard. Admit. Ms. Kavita Shah, advocate for the respondents waive service. By consent, heard forthwith.

2. The Appellant challenges the order dated 12th December 1997 passed in Chamber Summons No. 508 of 1994 . By the impugned order the application filed by the respondent nos. 6 to 11 herein was allowed to join them as the party defendants to the suit. The contention of the said respondents was that they have purchased undivided share in the suit property pursuant to the auction thereof by the respondent no.4 in relation to the rights of the respondent nos. 1 to 3 to the suit property.

3. The facts in brief are that the appellant herein is the original plaintiff, the respondent nos. 1 to 5 are the original

defendants and respondent nos. 6 to 11 are the parties who have been allowed to be joined as the defendants pursuant to their application being allowed under the impugned order. The suit property comprises of the terrace on the second floor of the existing building admeasuring 2000 square feets along with unutilised floor space index in respect of Plot no. 457, 15th Road, Khar, Bombay 400 052. The plot originally belonged to respondent nos. 1 to 3. The ground floor as well as the 1st floor is in possession of the tenants whereas the 2nd floor is in possession of the respondent nos. 1 to 3. On 11th July 1980 the respondent nos. 1 to 3 agreed to sell the suit property, that is, the terrace of the 2nd floor of the existing building admeasuring 2000 square feets along with the said unutilised floor space index, for a consideration of Rs.1,95,000/-, out of which a sum of Rs.25,000/- was paid as advance. On 12th November 1980 the appellant was put in possession of the suit property by the respondent nos. 1 to 3 and an irrevocable power of attorney was also executed on 24th March 1981. It is the case of the appellant that the

Municipal Corporation approved the building plans submitted by the appellant in the year 1981 and also issued commencement certificate for construction. The appellant accordingly started construction in April 1983. Some times in 1985 the appellant was compelled to file suit bearing no. 3106 of 1985 for specific performance of the said agreement dated 11th November 1993. On 21st April 1987 the respondent no.4 herein filed suit no. 1376 of 1987 against the respondent nos. 1 to 3 for recovery of certain dues. The said suit came to be decreed ex parte. In the said suit, Court Receiver was appointed in relation to the ground, first and second floors of the said building. The claim was put up for recovery of the dues against the respondent no.1. The appellant took out notice of motion no. 1808 of 1993 in the said suit no. 1306 of 1987, against the bank, the respondent no.4 and others praying for the relief of temporary injunction restraining the respondent no.4 and the Court Receiver from selling the suit property, i.e., the terrace and unutilised FSI which was agreed to be sold to the appellant by the

respondent nos. 1 to 3 under the agreement dated 11th November 1980. The said Notice of Motion was disposed of by order dated 30th July 1993 observing that "... it is necessary to protect the plaintiffs as well as the FSI admeasuring 1367.50 sq. ft., available for construction on the terrace of the building in question , making it clear that the Receiver shall however proceed with the sale of the building excluding F.S.I. and the terrace. ..." Accordingly auction was held and the Court Receiver submitted the report on 10th August 1993. The appellant took out notice of motion No. 2283 of 1993 in the suit no. 1376 of 1987 for further interim reliefs. The same was heard on 5th October 1993 wherein the Receiver made statement that the facts relating to the appellant' sright under the agreement dated 11th November 1980 and the court order would be mentioned in the conveyance to be executed with the new purchaser of the building to be sold in auction. On 16th April 1994 the respondent nos. 6 to 11 took out Chamber Summons No. 508 of 1994 in the appellant's suit no. 3106 of

1994 praying that they be joined as the party defendants in the said suit consequent to the purchase of the building in the said auction. The same was opposed by the appellant. However, the Chamber Summons was allowed by the impugned order. Hence the present appeal.

4. The only ground on which the impugned order is sought to be challenged is that the purchasers steps in the shoes of the erstwhile owner consequent to the sale of the property and therefore they are not necessary party having purchased the property with all the encumbrances and charges on the property on the day of the auction. Though the proposition canvassed cannot be found fault with, the applicability thereof depends upon the facts of each case. In the case in hand undoubtedly the respondent nos. 6 to 11 have purchased only undivided share in the property and the remaining undivided share is the subject matter of the suit no. 3106 of 1994, filed by the respondent for specific performance in relation to the agreement dated 11th November 1980 with the erstwhile owner. Once it is not in

dispute that the respondent nos. 6 to 11 have acquired only the undivided share in the property of which the remaining share in the property is the subject matter of the said suit no. 3106 of 1994, obviously the respondents would be not only the proper parties but also be necessary parties to the suit. Any decision which will be arrived at in the suit may affect the rights of the respondent nos. 6 to 11 in view of the fact that it is the case of the appellant himself that in terms of the agreement dated 11th November 1980 he had agreed to purchase unutilized FSI along with the terrace on the 2nd floor of the building in question. To what extent the appellant would be entitled to carry out the construction by utilizing the unutilized FSI by raising the hight of the existing building and to what extent the construction could affect the rights of respondent nos. 6 to 11 can only be gone into in the course of the hearing of the said suit and for that purpose the presence of those respondents in the said suit is absolutely necessary. Considering this aspect of the matter the respondent nos. 6 to 11 have been made party defendants in

the suit. Being so, there is no case made out for interference in the impugned order. If the amendment pursuant to the impugned order has not been carried out the same shall be carried out within a period of 4 weeks from today.

5. With the above observations, the appeal is dismissed with no order as to costs.

(R.M.S. KHANDEPARKAR J.)

(D. G. KARNIK J.)